GISE KAM KWAN INTERNATIONAL TRADE LTD
v. ANTARA STEEL MILLS SDN BHD

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
SUPANG LIAN JCA
AZHAHARI KAMAL RAMLI JCA
[CIVIL APPEAL NO: W-02(IM)(NCvC)-2329-12-2022]
30 AUGUST 2024

Abstract – *(i) An arbitration clause in a main agreement is not automatically incorporated into a subsequent termination and settlement agreement ('TSA') merely by reference to the main agreement in the TSA, unless the reference is specifically intended to make the clause part of the TSA; (ii) Recitals in an agreement are generally not legally binding and do not create substantive obligations. A reference to the main agreement in the recital of the TSA is not sufficient to incorporate an arbitration clause; (iii) If the TSA is a stand-alone agreement that supersedes the main agreement, the arbitration clause in the main agreement will not apply; (iv) If the TSA contains an express dispute resolution clause that is inconsistent with arbitration, that clause will prevail over any implied arbitration agreement.*

ARBITRATION: *Arbitration agreement – Arbitration clause – Recovery of amount outstanding under termination and settlement agreement ('TSA') – Main agreements contained arbitration agreement while TSA made no express reference to arbitration agreement – Reference to main agreements merely in recital to TSA – TSA contained expression that party at liberty 'to take legal action to claim' amount spelt in TSA – Owing party filed for reference of dispute to arbitration – Whether arbitration agreement in main agreements had been incorporated by reference into TSA – Whether arbitration clause part of TSA and had to be considered – Whether main agreements superseded by TSA – Whether TSA stand-alone agreement – Whether references 'to take legal action to claim' amount agreed to be outstanding and 'court fee' indicate departure of parties to forgo arbitration in favour of court proceedings – Whether doctrine of separability and kompetenze-kompetenze applied – Whether matter ought to be referred to arbitration – Arbitration Act 2005, ss. 9(5) & 10*

The appellant ('plaintiff') had commenced an action against the respondent ('defendant') to recover the amount outstanding under a termination and settlement agreement ('TSA'). The defendant then duly filed at the High Court, pursuant to s. 10 of the Arbitration Act 2005 ('Act'), for a stay of the court proceedings and for a reference of the dispute to arbitration. The High Court was conscious of the fact that there was no express arbitration agreement in the TSA but was satisfied that there was a reference to the main

agreements that did contain an arbitration clause such that the arbitration clause had been incorporated into the TSA. Having concluded that there was a valid and enforceable arbitration agreement which was not null and void, inoperative or incapable of being performed and the defendant not having taken any other steps in the proceedings, the High Court granted a stay of the court proceedings, under s. 10 of the Act, pending reference to arbitration. Hence, the present appeal by the plaintiff. The issues that arose were: (i) whether the arbitration agreement in the main agreements had been incorporated by reference such as to make that arbitration clause part of the TSA; (ii) whether the TSA was a stand-alone entire agreement independent of the main agreements and superseding the main agreements; (iii) whether the references to 'take legal action to claim the amount' and 'court fee' indicated a clear intention of the parties to resolve all disputes arising from the TSA *via* court proceedings; and (iv) whether the doctrine of separability and *kompetenze-kompetenze* applied such that matter was to be referred to arbitration.

Held (allowing appeal; setting aside order of High Court and remitting matter back to High Court for hearing and case management)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) Section 9(5) of the Act deals with the incorporation of an arbitration clause by reference to it in an agreement and the reference is such as to make that clause part of the agreement. It is not every reference in agreement to a document containing an arbitration clause that would automatically incorporate that arbitration clause as part of the agreement. The reference must be for the purpose of making that arbitration clause part of the agreement which in this case was the TSA. It is only too obvious that a reference may be for context and incidental to the agreement and not for the purpose of engrafting it and incorporating it into the agreement. Here, the reference was in the recital to the TSA. A clause in the recital is not typically considered to be legally binding as opposed to the operative clauses of an agreement. Recitals do not generally contain specific obligations, rights and duties of the parties and therefore, are not enforceable. They provide the factual matrix in interpreting the operative clauses but they themselves do not create a binding agreement. They set the stage for the substantive clauses and sound forth its scope. As the reference here was in the recital and for context and chronology and nothing came close to the terms and conditions agreed by the parties, there had not been an effective incorporation by reference as the reference was not such as to make that arbitration clause part of the TSA. (paras 13, 14, 16, 18, 19 & 24)

(2) There was a history behind the TSA, traceable to its source in the main agreements and hence, a connection thereto. However, the TSA was also severable from the main agreements, both in its implementation and enforcement. There was nothing left of the obligations of the parties in the main agreements save for the obligation of the defendant to pay the

plaintiff the agreed amount. The TSA was not a supplementary agreement where the terms and conditions of the main agreements were imported into the supplementary agreement. It was not a unilateral termination agreement where some of the obligations of the parties may survive the termination and, with that, the agreement of the parties to arbitrate under the arbitration agreement which will be engaged to resolve all disputes arising out of the termination. Instead of an arbitration agreement, the parties crafted a markedly different dispute resolution clause in the TSA. There was no reference at all to the terms and conditions of the main agreements, much less a reference to the arbitration agreement found in the main agreements but instead, a brand-new dispute resolution clause which was a departure from an agreement to arbitrate and indeed indicative of an intention to discard altogether the mode of dispute resolution by arbitration. (paras 28, 29, 30, 32 & 37)

(3) Having regard to the differently worded dispute resolution clause where the parties contemplated no further unresolved disputes after the TSA, the clear intention of the parties must be 'to take legal action to claim outstanding payment … including … court fee from Party A (Antara Steel)' by way of a claim filed with the court. The language used was foreign to arbitration and indeed, a clear departure from what had been clearly used before with reference to having any disputes submitted to arbitration in cl. 23.1 of the main agreements. The clear and unequivocal reference to taking legal action in court, as found in cl. 6 in the operative part of the TSA, would override what was, at best, a general reference in the recitals to the main agreements and not even to the arbitration clause in the main agreements. Even if there was to be a conflict between the recital and the operative term of the TSA, the TSA would prevail. (paras 52 & 54)

(4) The doctrine of separability is used to support the stand that an arbitration agreement would survive even the termination of a main contract containing the arbitration agreement and even when the main contract has become null and void. Under the doctrine of *kompetenze-kompetenze*, an arbitral tribunal can decide on its own jurisdiction when challenged, though its decision is not final. The arbitral tribunal may decide based on the application of the doctrine of separability where relevant. Under the doctrine of separability, an arbitration agreement has a life of its own and is separate from that of the main contract containing the arbitration clause such that even if the main contract is held to be null and void because of illegality, frustration or a fundamental breach, the validity of the arbitration agreement remains intact and is unaffected by what happened to the main contract. Even in a case where the main contract is said to have been entered into fraudulently, that does not necessarily mean that the arbitration agreement was procured fraudulently. It is perhaps in cases where the

main contract containing the arbitration agreement was a forgery that there is no arbitration agreement. Where the existence of an arbitration clause in the main contract is not in dispute, but which contract containing the arbitration clause is found to be null and void, the arbitration clause still survives and is not invalid under the doctrine of separability. Therefore, the doctrine of separability would save and sustain an arbitration agreement even when the contract containing the agreement had been held to be null and void for illegality or that there had been frustration or termination or repudiation for a fundamental breach. If, by the application of the doctrine of separability was meant here that the arbitration clause found in the main agreements survives the termination of the main agreements and by virtue of that, was applicable upon termination to resolving the dispute that had arisen, then regard must be had to the fact that the termination agreement was also a settlement agreement as stated in recital 4 of the TSA. It was also a new agreement that had superseded the previous main agreements such that it could be confidently said that the main agreements, including the arbitration clause therein, had ceased to operate by reason of some further agreement between the parties in the TSA. (paras 61-63 & 73-76)

Case(s) referred to:

Ahmad Al-Naimi (T/A Buildmaster Construction Services) v. Islamic Press Agency Inc [2000] 1 LI LR 522 ***(refd)***

Asia Pacific Higher Learning Sdn Bhd v. Stanford College (Malacca) Sdn Bhd [2024] CLJU 1598; [2024] 1 LNS 1598 CA ***(refd)***

Best Re (L) Ltd v. Ace Jerneh Insurance Bhd [2015] CLJU 959; [2015] 1 LNS 959 CA ***(refd)***

Cockett Marine Oil (Asia) Pte Ltd v. MISC Bhd & Another Appeal [2023] 1 CLJ 20 CA ***(refd)***

COT v. COU & Ors [2023] SGCA 31 ***(refd)***

DHL Project & Chartering Ltd v. Gemini Ocean Shipping Co Ltd; The Newcastle Express [2023] 3 All ER 580 ***(refd)***

Fiona Trust & Holding Corporation And Others v. Privalov And Others [2007] 4 All ER 951 ***(refd)***

Iskandar Coast Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2019] 7 CLJ 143 CA ***(refd)***

Macsteel International Far East Ltd v. Lysaght Corrugated Pipe Sdn Bhd [2023] CLJU 1078; [2023] 1 LNS 1078 CA ***(refd)***

Monde Petroleum SA v. Westernzagros Ltd [2015] EWHC 67 (Comm) ***(refd)***

Nigel Peter Albion v. Naza Motor Trading Sdn Bhd [2007] 2 All ER 1075 ***(refd)***

Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd [2016] 9 CLJ 1 FC ***(refd)***

Re Moon, ex parte Dawes [1886-90] All ER Rep 479 ***(refd)***

Vasudevan Vazhappulli Raman v. T Damodaran PV Raman & Anor [1981] CLJ 84; [1981] CLJ (Rep) 101 FC ***(refd)***

Yap Phooi Yin & Anor v. CM Boyd [1981] CLJU 144; [1981] 1 LNS 144 FC ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 8, 9(1), (2), (3), (5), 10, 11, 18(7), (8), 37, 38, 39, 44(1), 50
Contracts Act 1950, s. 29
Rules of Court 2012, O. 59 r. 1, O. 91

Other source(s) referred to:
Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law On International Commercial Arbitration: Legislative and Commentary*, Kluwer Law and Taxation Publishers, Boston, pp 263-264
MJ Mustill & SC Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd edn, London, Butterworths, (1989), pp 464-465

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[Editor's note: For the High Court judgment, please see Gise Kam Kwan International Trade Ltd v. Antara Steel Mills Sdn Bhd [2022] CLJU 3228; [2022] 1 LNS 3228 (overruled).]

Reported by Lina E

JUDGMENT

Lee Swee Seng JCA:

[1] This appeal raises interesting and intriguing questions on whether an arbitration agreement, said to have a life of its own under the doctrine of separability would still be applicable when two main agreements ("main agreements") that contain the arbitration agreement are followed by a termination and settlement agreement ("TSA") which has no express reference to the arbitration agreement. Instead, it has the expression in cl. 6 thereof of a party be at liberty "to take legal action to claim" the amount spelt out in the TSA. There was also a reference in the same clause to recovering "court fee" from the party liable to pay under the TSA.

[2] The issue of whether the arbitration agreement in the main agreements had been incorporated by reference into the TSA such as to make that arbitration clause part of the TSA would have to be considered. In this case, the reference to the main agreements were merely in the recital to the TSA.

[3] Ancillary to that would be whether the main agreements had been superseded by the TSA such that the latter is a stand-alone entire agreement. Would references "to take legal action to claim" amount agreed to be outstanding and "court fee" indicate a departure of the parties to forgo arbitration in favour of court proceedings?

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At The High Court

[4] When the plaintiff, Gise Kam Kwan International Trade Ltd ("Gise International") commenced a court action to recover the amount outstanding under the TSA, the defendant, Antara Steel Mills Sdn Bhd ("Antara Steel") duly filed its s. 10 of the Arbitration Act 2005 (Act 646) ("AA 2005") for stay of the Court proceedings and for a reference of the dispute to arbitration.

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[5] The High Court was conscious of the fact that there was no express arbitration agreement in the TSA but was satisfied that there was a reference to the main agreements that did contain an arbitration clause such that the arbitration clause had been incorporated into the TSA.

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[6] The High Court was further fortified in its conclusion having regard to the fact that the TSA does not contain a clause on the specific mode of dispute resolution (para. 31 of the GOJ) and that "legal action" in cl. 6 of the TSA includes arbitration proceedings. Further there was no indication on the TSA that the parties wanted to resolve their disputes other than through arbitration (para. 3 of the GOJ).

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[7] The High Court also considered the link between the TSA and the 2013 main agreement and that as the arbitration clause is present in both the main agreements of 2009 and 2013, parties must have intended, in the absence of clear agreement to the contrary, to want to resolve their disputes *via* arbitration, as a one-stop centre for all adjudications.

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[8] Having concluded that there was a valid and enforceable arbitration agreement which is not null and void, inoperative or incapable of being performed and the defendant not having taken any other steps in the proceedings, the High Court granted a stay of the court proceedings under s. 10 of the AA 2005 pending reference to arbitration.

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[9] The plaintiff, a company incorporated in China, being dissatisfied with the decision of the High Court, had appealed to the Court of Appeal.

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Before The Court Of Appeal

[10] The issues before the Court of Appeal may be stated as follows:

(i) whether the arbitration agreement in the main agreements had been incorporated by reference such as to make that arbitration clause part of the TSA;

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(ii) whether the TSA is a stand-alone entire agreement independent of the main agreements and superseding the main agreements;

(iii) whether the references to "take legal action to claim the amount" and "court fee" indicate a clear intention of the parties to resolve all disputes arising from the TSA *via* court proceedings; and

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(iv) whether the doctrine of separability and *kompetenze-kompetenze* apply such that matter is to be referred to arbitration.

Whether The Arbitration Agreement In The Main Agreements Had Been Incorporated By Reference Such As To Make That Arbitration Clause Part Of The Termination And Settlement Agreement

[11] It is not disputed that the 2009 and 2013 main agreements do contain an arbitration agreement as follows in cl. 23.1 thereof:

> **Any dispute** between the parties hereto **regarding this Agreement**, its interpretation or construction **shall be submitted to the Director of the Regional Centre for Arbitration** in Kuala Lumpur and any such reference shall be deemed to be a submission to arbitration within the meaning of Arbitration Act 1952. The award shall be in writing and shall bind the parties hereto.
>
> (emphasis added)

[12] The arbitration agreement satisfies the requirements of s. 9(1), (2) and (3) of the AA 2005 as follows:

> Definition and form of arbitration agreement
>
> 9. (1) In this Act, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.
>
> (3) An arbitration agreement shall be in writing.

[13] Further, s. 9(5) of the AA 2005 deals with the incorporation of an arbitration clause by reference to it in an agreement and the reference is such as to make that clause part of the agreement as follows:

> (5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing **and the reference is such as to make that clause part of the agreement**.
>
> (emphasis added)

[14] Thus, it is not every reference in an agreement to a document containing an arbitration clause that would automatically incorporate that arbitration clause as part of the agreement. The reference must be for the purpose of making that arbitration clause part of the agreement, which in this case is the TSA.

[15] Granted, there need not be an explicit reference to the arbitration clause in the other document, for to so require would be far too restrictive. See the Court of Appeal case of *Best Re (L) Ltd v. Ace Jerneh Insurance Bhd*

A [2015] CLJU 959; [2015] 1 LNS 959; [2015] 5 MLJ 513 where it was held at p. 524 with respect to s. 9(5) AA 2005 that:

> [27] Reading the section it is obvious that incorporation of an arbitration clause in one agreement may be made by way of reference to an arbitration clause found in another agreement, in most instances, the
B agreement that exist between the same parties. But, **what is most important is that the reference clause must be clear as to the intentions of the parties to incorporate that particular arbitration clause in their agreement**. We say so because of the expression '... the reference is such as to make that clause part of the agreement', found in s 9(5) of the Act.
(emphasis added)

C **[16]** It is only too obvious that a reference may be for context and incidental to the agreement and not for the purpose of engrafting it and incorporating it into the agreement. Here, the reference is in the recital to the TSA with Antara Steel as party A and Gise International as party B as follows:

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> **Whereas**
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> (1) Party A and Party B has signed the Supply and Maintenance Agreement on 12th, August, 2009, Contract No.: ANT/GISE/001/09, providing that Party B shall supply, install and maintain the refractory
E material such as electric arc furnace, ladle and tundish, for a validity period of 3 years.
>
> The agreement has been extended on 12th August 2013, Contract No.: ANT/GISE/001/13, with the expiry date of 11th, August, 2016.
>
> (2) Party A and Party B have confirmed that the Supply and Maintenance
F Agreement has been terminated on 1 st, May, 2015 with three- month prior written notice from Party B.
>
> (3) ...
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> (4) **Party A and Party B have reached a consensus regarding the termination** of the Supply and Maintenance Agreement **together with the**
G **settlement thereof** on 21st, August, 2015, with the Meeting Minute signed for confirmation by both parties.
>
> Based on the above-mentioned circumstances, **both parties have reached the following terms and conditions** ... .
>
> (emphasis added)

H **[17]** The TSA was both a termination and a settlement agreement such that the main agreements 2009 and 2013 have been superseded by the TSA. Thereafter, there was no need to go back to either of the main agreements of 2009 or 2013, nor go behind and before the TSA.

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[18] Generally, the recital to an agreement preceded by the word "whereas" would set out the chronology of key events for context and the terms and conditions of the agreement would be found in the main body of the agreement or its operative part. A recital in an agreement serves as an introduction to the background and purpose of the agreement. A clause in the recital is not typically considered to be legally binding as opposed to the operative clauses of an agreement. Nevertheless, a recital plays an important role in helping one to discern the intentions of the parties.

[19] Recitals do not generally contain specific obligations, rights and duties of the parties and therefore are not enforceable. They provide the factual matrix in interpreting the operative clauses but by themselves, they do not create binding agreement. They set the stage for the substantive clauses and sound forth its scope.

[20] The reference to the "supply and maintenance agreement" was in the context of capturing the consensus reached by the parties regarding its termination together with the settlement arrived at with the operative parts of the TSA setting out the terms and conditions that the parties have mutually agreed. It was to spell out very significantly that henceforth, the parties need not have to refer to or revisit the supply and maintenance agreement but only to honour the terms and conditions of the TSA as can be discerned from the words employed in recital 4) as follows:

> **Party A and Party B have reached a consensus regarding the termination** of the Supply and Maintenance Agreement **together with the settlement thereof** ... Based on the above-mentioned circumstances, **both parties have reached the following terms and conditions** ...
>
> (emphasis added)

[21] The operative part of the TSA after recital (4) does not at all refer to the supply and maintenance agreement which has the arbitration clause and thus, the arbitration clause cannot be said to have been referred to and much less could it be said that it has been "incorporated by reference".

[22] Our s. 9(5) of the AA 2005 is modelled after the UNCITRAL Model Law on International Commercial Arbitration where its art. 7(2) reads:

> ... the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

[23] Therefore, the relevant commentary on the UNCITRAL Model Law would be of some assistance. The learned authors Howard M Holtzmann and Joseph E Neuhaus in "*A Guide to the UNCITRAL Model Law On International Commercial Arbitration: Legislative and Commentary*", Kluwer Law and Taxation Publishers, Boston at pp. 263 to 264 commented as follows:

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4. Reference *in a written contract to a document containing an arbitration clause if the reference makes the clause part of the contract*. This sentence was added to make clear that when an arbitration clause is not contained in a written contract but rather a document referred to therein – such as general conditions of contract or another contract – the arbitration agreement may be deemed to be 'in writing'. The contract containing the reference must be in writing. This probably means that it must meet the requirements contained in the second sentence of the paragraph. That is, the contract probably must be either signed or contained in an exchange of letters, telexes, *etc*. Otherwise, as already noted, the parties could, merely by placing the arbitration clause in a separate document, avoid the requirements of a written assent from each party.

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The meaning of the requirement that "the reference [be] such as to make [the arbitration] clause a part of the contract" may raise questions. The Working Group made clear that it did not mean the contract had to make explicit reference to the arbitration clause itself. The requirement was adopted as a middle ground between two positions: one view was that the text of the arbitration agreement had to "be before both parties" in order to bind them; another view was that only a "reference" in the contract to general conditions or other documents containing the arbitration clause was enough. *The language adopted appears to mean that the general conditions, prior contract or other document must have been intended to be incorporated into the contract, and not merely referred to in, for example, a "whereas" clause or as background to the agreement*.

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(emphasis added)

[24] We are of the considered view that as the reference here is in the recital and for context and chronology and nothing coming close to the terms and conditions agreed by the parties, there has not been an effective incorporation by reference as the reference is not such as to make that arbitration clause part of the TSA.

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[25] It is the operative part of the TSA that is binding on the parties and there is clearly no reference to the main agreements there. A reference to it in the recital for context is ineffective in incorporating the arbitration agreement found in the main agreements into the TSA.

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Whether The TSA Is A Stand-alone Entire Agreement Independent Of The Main Agreements And Superseding The Main Agreements

[26] The terms and conditions of the TSA can be implemented and complied with without the need to refer to the main agreements. The terms and conditions involved the payment by Antara Steel to Gise International of an agreed sum of RMB 3,979,601.13 made up as follows:

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No.	Description		Outstanding Sum Owed by Antara Steel to Gise international (RMB)
	Clause No. in the Termination Agreement	Documents Issued by Gise International	
a.	Clause 5.2: Usable Stock Material	Invoice (No.: KK201506)	405,855.03
b.		Invoice (No.: KK202101)	773,797.91
c.		Invoice (No.: KK202102)	1,495,364.19
d.	Clause 5.3: Installed Stock Material	Letter dated 20.10.2021	1,304,584.00
	TOTAL		3,979,601.13

[27] All the outstanding and unresolved matters have crystallised into the TSA and in that sense it is a stand-alone entire agreement. There is nothing on the main agreements of 2009 and 2013 that needs referencing or resurrecting. The TSA is self-contained.

[28] The High Court below had held that the TSA did not arise spontaneously and that it had emerged from the 2013 agreement and that there is a connection between the TSA and the 2013 agreement. See para. 34 of the High Court's GOJ. Those observations are no doubt correct and no one would seriously dispute that there is a history behind the TSA traceable to its source in the main agreements and hence a connection thereto as captured in recital 4).

[29] However, what is settled in the TSA is also severable from the main agreements both in its implementation and enforcement. There is nothing left of the obligations of the parties in the main agreements save for the obligation of Antara Steel to pay Gise International the agreed amount. There is no allegation of misrepresentation, fraud, forgery or lack of authority or capacity to enter into the TSA.

[30] The TSA is not a supplementary agreement where the terms and conditions of the main agreements are imported into the supplementary agreement. It is not a unilateral termination agreement where some of the obligations of the parties may survive the termination and with that the agreement of the parties to arbitrate under the arbitration agreement which will be engaged to resolve all dispute arising out of the termination.

[31] Here is a case where both the parties had reached a consensus on the termination and settlement of all outstanding obligations arising from the termination which the parties had reached as spelt out in the terms and conditions of the TSA.

[32] The remaining question then is whether there is an arbitration agreement in the TSA with respect to any dispute in the interpretation or construction of the TSA, and reading the TSA as a whole, both parties did not contemplate anymore issues that could arise following the mutual termination and settlement agreement. Little wonder that instead of an arbitration agreement, the parties crafted a markedly different dispute resolution clause in cl. 6 of the TSA that reads:

> If Party A [Antara Steel] fails to pay any payment stated herein, Party B [Gise International] is entitled to **take legal action to claim outstanding payment** and all the direct and indirect loss including without limitation to liquidated damages, late fee, attorney fee and **court fee** from Party A [Antara Steel].
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> (emphasis added)

[33] If the parties had wanted to have the recovery action be *via* arbitration, they could easily have copied and pasted the arbitration agreement which first appeared on the 2009 agreement which was later copied into the 2013 agreement. Instead, the parties agreed to a differently worded dispute resolution clause, which is more confined to a recovery action for the agreed amount outstanding or so much of it that has not been paid, as parties do not envisage further issues to be resolved, having resolved all potential disputes in the TSA that crystallised and captured all possible conflicts between the parties. We are familiar with the old adage "there is no need to reinvent the wheel" and "if it ain't broken, don't fix it".

[34] By drafting a different dispute resolution clause, the parties' clear intention was no longer to submit any further disputes to arbitration and so the parties have taken the arbitration agreement out of the TSA and substituted it with a clause on "to take legal action to claim outstanding payment."

[35] The drafting of a new dispute resolution clause by the same parties must be a strong indication of the parties desiring not to be bound by the previous arbitration clause but instead to have the new dispute resolution clause applied to them. There is a strong presumption that when different words are used, the parties intend to express a different meaning and intention.

[36] Otherwise, the parties could have stated that the terms of the previous main agreements would apply where the TSA is silent or that all the terms and conditions of the main agreements are deemed imported into the TSA save in the event of conflict, the TSA would prevail.

[37] There is no reference at all to the terms and conditions of the main agreements, much less a reference to the arbitration agreement found in the main agreements but instead, a brand-new dispute resolution clause which is a departure from an agreement to arbitrate and indeed indicative of an intention to discard altogether the mode of dispute resolution by arbitration.

Whether The References To "Take Legal Action To Claim The Amount" And "Court Fee" Indicate A Clear Intention Of The Parties To Resolve All Disputes Arising From The TSA *Via* Court Proceedings

[38] The language of arbitration is different from the language of litigation or a claim in court. Words have their prescribed and defined meaning and also their popular usage and distinct meaning. We accept that, by dictionary definition of a "legal action", would include an arbitration as stated in the *Black's Law Dictionary* 9th edn where it is stated:

> Legal proceeding – Any proceeding authorized by law and instituted in a court or tribunal to acquire a right or to enforce a remedy.

[39] In that sense, a claim before the tribunal for consumer claims or the tribunal for homebuyers claim would be a legal proceeding. No one can seriously contest that a claim before an Arbitral Tribunal is a legal action taken.

[40] We are not unaware that the law insider website has this broad definition of a "legal action" as follows:

> Legal Action means and includes any claim, counterclaim, demand, action, suit, arbitration, inquiry, proceeding or investigation before any federal, state or foreign court or other **tribunal**, or any investigative or regulatory agency or SRO.
>
> (emphasis added)

[41] Be that as it may, when it comes to commencing an arbitration, the language used is distinctly different from taking legal action in court. It would not be to "take legal action to claim outstanding payment ... from Party A (Antara Steel" but rather to submit the dispute to arbitration as captured in cl. 23.1 of the main agreements which operative parts read:

> Any dispute between the parties hereto regarding this Agreement, its interpretation or construction shall be submitted to the Director of the Regional Centre for Arbitration in Kuala Lumpur ...

[42] Arbitration is an alternative dispute resolution designed to take away from the traditional combative approach in suing in a court of law where the arbitrators are appointed by the parties unless they could not agree and the

A procedure is less formal where the Evidence Act 1950 does not apply and which proceedings are private which ensure some degree of confidentiality. The sting in suing is taken away and with that the glare of a public trial where the issues are open to scrutiny by the public.

B **[43]** It would be a strain on the legal language employed if one were to say "to take legal action to claim outstanding payment by arbitration from party A (Antara Steel)". The legal language used in the AA 2005 and indeed in legal textbooks and law journals with reference to proceeding with arbitration is that of submitting a dispute to arbitration as can be seen in s. 9 of the AA 2005 as follows:

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> 4. (1) **Any dispute which the parties have agreed to submit to arbitration under** an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia.
>
> (emphasis added)

D **[44]** Likewise, in setting aside an arbitral award we find the expression "submit to arbitration" in s. 37 of the AA 2005 as follows:

> 37. (1) An award may be set aside by the High Court only if:
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> E (a) the party making the application provides proof that:
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> (iv) the award deals with a dispute not contemplated by or not falling within the terms of the **submission to arbitration**;
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> (v) subject to subsection (3), the award contains decisions on matters beyond the scope of the **submission to arbitration**; or
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> F ...
>
> (emphasis added)

[45] Consistent with that legal language and usage, cl. 23.1 of the 2009 and 2013 agreements have unmistakably incorporated the legal language of arbitration when it stated that: "All disputes ... **shall be submitted to the** G **Director of the Regional Centre for Arbitration** in Kuala Lumpur and any such reference shall be deemed to be a submission to arbitration." (emphasis added).

[46] When reference is made in the AA 2005 to "costs and expenses of an arbitration" the expression used in s. 44(1) provides as follows:

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> 44. (1) Unless otherwise agreed by the parties:
>
> (a) the costs and expenses of an arbitration shall be in the discretion of the arbitral tribunal who may:
>
> (i) direct to and by whom and in what manner those costs or any
> I part thereof shall be paid;
>
> (ii) tax or settle the amount of such costs and expenses;
>
> and

(iii) award such costs and expenses to be paid as between solicitor and client;

(b) any party may apply to the High Court for the costs to be taxed where an arbitral tribunal has in its award directed that costs and expenses be paid by any party, but fails to specify the amount of such costs and expenses within thirty days of having being requested to do so; or

(c) each party shall be responsible for **its own legal and** other expenses and for an equal share of the fees and **expenses of the arbitral tribunal** and any other expenses relating to the arbitration in the absence of an award or additional award fixing and allocating the costs and expenses of the arbitration.

(emphasis added)

[47] There is conspicuously no mention anywhere of "court fee" which the parties need to pay in the AA 2005. The reason is not difficult to find. It is that the arbitration proceedings take the resolution of the dispute away from the court and so there are no "court fee" payable. Where limited applications are permitted, the "court fee" that are recoverable would be given as part of the "court costs". Learned counsel for Antara Steel had focus on that and attributing the reference to "court fee" as referring to applications that may have to be made to the courts. However, these applications would be exceptions that underscore the general rule which is that there is no recourse to the courts except as provided for in the AA 2005.

[48] The more common permitted applications that may be made to the courts in line with s. 8 of the AA 2005 are under s. 11 for interim measures, s. 37 for setting aside an award and s. 38 for recognition and enforcement of an award. Section 8 of the AA 2005 reads:

> No court shall intervene in matters governed by this Act, except where so provided in this Act.

[49] Section 50 of the AA 2005 further provides that:

> Any application to the High Court under this Act shall be by an originating summons as provided in the *Rules of the High Court 1980 [P.U. (A) 50/1980].

[50] In contra distinction, the Rules of Court 2012, there is a detailed provision on "costs" in O. 59 and O. 59 r. 1 which defines "costs" as "includes **fees**, charges, disbursements, expenses and remuneration." (emphasis added). There is also a whole O. 91 titled "court fees" and devoted to court fees for the various documents filed with the court in Appendix B of the Rules of Court 2012.

[51] One would have thought that if cl. 6 of the TSA is an arbitration agreement, then the concern for recovery of related costs must surely be the "fees and expenses of the arbitral tribunal" as provided for in s. 44(c) of the

AA 2005 for that would constitute the bulk of the costs and expenses of arbitration but that is noticeably absent, but instead reference is made to "court fee". Such fees and expenses of the arbitral tribunal would normally follow the event.

[52] Having regard to the differently worded dispute resolution clause where the parties contemplated no further unresolved disputes after the TSA, the clear intention of the parties must be "to take legal action to claim outstanding payment ... including ... court fee from party A (Antara Steel)" by way of a claim filed with the court. The language used is foreign to arbitration and indeed, a clear departure from what had been clearly used before with reference to having any disputes submitted to arbitration in cl. 23.1 of the main agreements.

[53] The default arbitration clause had been deleted and in its place is a different dispute resolution clause with reference to taking "legal action to claim outstanding payment" and "court fee" which can only mean an action filed with the court for a debt recovery claim pursuant to a termination and settlement agreement.

[54] The clear and unequivocal reference to taking legal action in court as found in cl. 6 in the operative part of the TSA would override what is at best, a general reference in the recitals to the main agreements and not even to the arbitration clause in the main agreements. Even if there be a conflict between the recital and operative term of the TSA, the TSA would prevail.

[55] Our attention was drawn to the following passage in *Monde Petroleum SA v. Westernzagros Ltd* [2015] EWHC 67 (Comm) which deals with the issue of whether an arbitration agreement in an earlier contract would bind the parties in a new contract as follows:

> [44] A termination or settlement agreement which contains no new dispute resolution clause is unlikely to be treated as a direct impeachment of an arbitration clause in an earlier agreement, in the absence of clear language, because it is directed merely at a challenge to the continued substantive rights under the matrix agreement, not the separate arbitration agreement within it. *But a new and inconsistent dispute resolution will raise the presumption that the parties intended to impeach not just the earlier agreement but also the dispute resolution agreement within it and so go directly to impeach the arbitration agreement. This is not a failure to give effect to the doctrine of separability, but the reverse*:
>
> > it recognises that a dispute resolution provision in the second agreement raises a presumption that the parties intended to address the separate arbitration agreement within the earlier agreement because both clauses are concerned with how and where disputes are to be resolved and in this respect are in conflict. (emphasis added)

[56] Here, the new contract in the TSA has a brand new differently drafted dispute resolution clause in cl. 6 thereof and thus, raising the presumption that the parties intended to discard the arbitration agreement in place of a legal action in court.

[57] The age-old wisdom expressed in *Re Moon, ex parte Dawes* [1886-90] All ER Rep 479 at p. 485 by Lopes LJ, quoted with approval in our Federal Court case of *Yap Phooi Yin & Anor v. CM Boyd* [1981] CLJU 144; [1981] 1 LNS 144; [1982] 1 MLJ 151, would resonate with us:

> ... There are several rules applicable to the construction of deeds. One of them is that, if the operative part of the deed is clear and the recitals are not clear, the operative part is to prevail. Again, if the recitals are clear, and the operative part is not clear, but ambiguous, the recitals are to control the operative part. If, on the other hand, the operative part is clear, and the recitals are clear, but the one is inconsistent with the other, the operative part is to prevail. Those are well-established rules.

[58] Yet, another argument was raised by learned counsel for Antara Steel in that the Chinese word translated "court fee" could also be translated as "arbitrator's fees" or "arbitral tribunal's fee". Parties must have in mind that like all translations the meaning of a word or words may be lost or diffused in translation and so they had incorporated a cl. 8 to the TSA which reads as follows:

> (8) This contract contains *Chinese translation*. If there is a conflict between the English version and Chinese version, the parties hereby agree that the **English version shall prevail and binding (*sic*) on the parties**.
>
> (emphasis added)

[59] We must not lose sight of the fact that the TSA is not an English translation of its original Chinese version, but rather a Chinese translation of its original English version. Little wonder that the parties had provided that in the event of a conflict between the two versions, the English version shall prevail and be binding on the parties. It is a case of the first in time shall prevail over a subsequent version.

[60] The reference to the English-Chinese, Chinese English Two-Way Law Dictionary is thus misplaced for there is only one meaning for the original version used of the words "court fee" and it means fees incurred in taking "legal action to claim outstanding payment" *via* an action in court.

Whether The Doctrine Of Separability And Kompetenze-kompetenze Apply Such That Matter Is To Be Referred To Arbitration

[61] These two concepts of separability and *kompetenze-kompetenze* are two separate principles in arbitration jurisprudence dealing with two different issues. The doctrine of separability is used to support the stand that an arbitration agreement would survive even the termination of main contract

containing the arbitration agreement and even when the main contract has become null and void. Under the doctrine of *kompetenze-kompetenze*, an arbitral tribunal can decide on its own jurisdiction when challenged, though its decision is not final. The arbitral tribunal may decide based on the application of the doctrine of separability where relevant.

[62] Under the doctrine of separability, an arbitration agreement has a life of its own and is separate from that of the main contract containing the arbitration clause such that even if the main contract is held to be null and void because of illegality, frustration or a fundamental breach, the validity of the arbitration agreement remains intact and is unaffected by what happened to the main contract.

[63] Even in a case where the main contract is said to have been entered into fraudulently, that does not necessarily mean that the arbitration agreement was procured fraudulently. It is perhaps in cases where the main contract containing the arbitration agreement was forgery, that there is no arbitration agreement.

[64] Lord Hoffman in the House of Lords' case of *Fiona Trust & Holding Corporation And Others v. Privalov And Others* [2007] 4 All ER 951 explained the concept and application of the doctrine of separability of arbitration agreement as follows:

> [17] The principle of separability enacted in s 7 means that *the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a 'distinct agreement' and can be void or voidable only on grounds which relate directly to the arbitration agreement*. Of course, there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a 'distinct agreement', was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement.
>
> [18] On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorised or for improper reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to enter into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement

remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.

(emphasis added)

[65] The issue in the present appeal is not whether the arbitration agreement survives the termination in the TSA, but whether the TSA containing a differently drafted dispute resolution agreement marks a clear departure from referring the dispute to arbitration but rather a right to take legal action to claim the agreed outstanding sum in court.

[66] Under our AA 2005, both the arbitral tribunal and the court have jurisdiction to decide on whether there is an arbitration agreement governing the resolution of the dispute between the parties. It all depends on whether the issue of jurisdiction of the arbitral tribunal based on an arbitration agreement is raised before the arbitral tribunal under s. 18 of the AA 2005.

[67] The arbitral tribunal may decide on the issue of its jurisdiction either as a preliminary question or issue or in the award on its merits as provided for in s. 18(7). The decision of an arbitral tribunal on its own jurisdiction is not final and that ruling is subject to appeal to the High Court within 30 days of being notified of the ruling under s. 18(8) and there shall be no further appeal against the decision of the High Court. In a case where the arbitral tribunal should elect to decide in an award on its merits, then the dissatisfied party may apply to have the award set aside on ground of a lack of jurisdiction or exceeding its jurisdiction or resist the application for the recognition and enforcement of the award on the same grounds. See ss. 37 and 38 respectively of the AA 2005.

[68] Section 18 reads as follows:

Competence of arbitral tribunal to rule on its jurisdiction

18.(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the *existence* or *validity of the arbitration agreement*.

(2) For the purposes of subsection (1):

(a) an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement; and

(b) a decision by the arbitral tribunal that the agreement is *null and void shall not ipso jure entail the invalidity of the arbitration clause*.

(3) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.

(4) A party is not precluded from raising a plea under subsection (3) by reason of that party having appointed or participated in the appointment of the arbitrator.

A (5) *A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.*

(6) Notwithstanding subsections (3) and (5), the arbitral tribunal may admit such plea if it considers the delay justified.

B (7) *The arbitral tribunal may rule on a plea referred to in subsection (3) or (5), either as a preliminary question or in an award on the merits.*

(8) Where the arbitral tribunal rules on such a plea as a *preliminary question that it has jurisdiction, any party may, within thirty days after having received notice of that ruling appeal to the High Court to decide the matter.*

C (9) While an appeal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

(10) No appeal shall lie against the decision of the High Court under subsection (8).

(emphasis added)

D **[69]** A challenge on the jurisdiction of an arbitral tribunal may be raised before the court under a s. 10 stay application or in a setting aside of an award under s. 37 or in opposing a recognition and enforcement of an award under s. 39 of the AA 2005.

E **[70]** In a matter that is already before the court under a s. 10 of the AA stay application, it is for the court to decide whether there is an arbitration agreement to begin with, before deciding if the arbitration agreement is null and void, inoperative or incapable of performance. The Federal Court in *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd* [2016] 9 CLJ 1; [2016] 5 MLJ 417 held as follows:

F [43] The *first issue* which *must be determined under s. 10(1) of the 2005 Act* is whether there is in *existence a valid and binding arbitration agreement or clause* between the parties relating to the subject matter of the claim in question.

(emphasis added)

G **[71]** The relevant parts of s. 10 of the AA 2005 is reproduced below:

10. Arbitration agreement and substantive claim before court.

(1) A court before which proceedings are brought in respect of a matter which is the subject of an **arbitration agreement shall**, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is **null and void, inoperative or incapable of being performed**;

H

(2) The court, in granting a stay of proceedings pursuant to subsection (1), **may impose any conditions** as it deems fit.

I

(3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

(emphasis added)

[72] Part two of the explanatory note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, explained its art. 16 from which our s. 18 of the AA 2005 is modelled after as follows:

4. Jurisdiction of arbitral tribunal

(a) Competence to rule on own jurisdiction

25. Article 16 (1) adopts the two important (not yet generally recognized) principles of "Kompetenz-Kompetenz" and of separability or autonomy of the arbitration clause." *Kompetenz-Kompetenz" means that the arbitral tribunal may independently rule on the question of whether it has jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, without having to resort to a court. Separability means that an arbitration clause shall be treated as an agreement independent of the other terms of the contract*. As a consequence, a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. Detailed provisions in paragraph (2) require that any objections relating to the arbitrators' jurisdiction be made at the earliest possible time.

26. *The competence of the arbitral tribunal to rule on its own jurisdiction (ie, on the foundation, content and extent of its mandate and power) is, of course, subject to court control*. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16(3) allows for immediate court control in order to avoid waste of time and money. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending before the court. *In those cases where the arbitral tribunal decides to combine its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36.*

(emphasis added)

[73] Thus, where the existence of an arbitration clause in the main contract is not in dispute, but which contract containing the arbitration clause is found to be null and void, the arbitration clause still survives and is not invalid under the doctrine of separability. See the English case of *DHL Project & Chartering Ltd v. Gemini Ocean Shipping Co Ltd; The Newcastle Express* [2023] 3 All ER 580 at [44] - [47] and the Singapore Court of Appeal *COT v. COU & Ors* [2023] SGCA 31 at para [30].

[74] Therefore, the doctrine of separability would save and sustain an arbitration agreement even when the contract containing the agreement has been held to be null and void for illegality or that there has been frustration or termination or repudiation for a fundamental breach.

[75] If by the application of the doctrine of separability is meant here that the arbitration clause found in the main agreements survives the termination of the main agreements and by virtue of that, is applicable upon termination to resolving the dispute that has arisen, then regard must be had to the fact that the termination agreement is also a settlement agreement as stated in recital (4) of the TSA that reads:

> *Party A and Party B have reached a consensus regarding the termination* of the Supply and Maintenance Agreement *together with the settlement thereof* on 21st, August, 2015, with the Meeting Minute signed for confirmation by both parties.
>
> Based on the above-mentioned circumstances, *both parties have reached the following terms and conditions*.
>
> (emphasis added)

[76] It is also a new agreement that has superseded the previous main agreements such that it can be confidently said that the main agreements including the arbitration clause therein, have ceased to operate by reason of some further agreement between the parties in the TSA. It may be said for argument sake that even if there had been an arbitration agreement, that has been rendered inoperative by the TSA that has its own dispute resolution clause.

[77] MJ Mustill & SC Boyd in their treatise titled *The Law and Practice of Commercial Arbitration in England*, 2nd edition, London, Butterworths, (1989) at pp. 464-465, have this helpful explanation as follows:

> The expression "inoperative" has no accepted meaning in English law, but it would seem apt to describe an agreement which, although not *void ab initio*, has for some reason ceased to have effect for the future. Three situations can be envisaged in which an arbitration agreement might be said to be "inoperative". *First, where the English Court has ordered that the arbitration agreement shall cease to have effect, or a foreign court has made a similar order which the English Court will recognise. Second, as is discussed in Chapter 32, there may be circumstances in which an arbitration agreement might become "inoperative" by virtue of common law doctrines of frustration, discharge by breach, etc. Third, the agreement may have ceased to operate by reason of some further agreement between the parties*. But the fact that issues in the arbitration overlap issues in proceedings between parties who are not bound by the arbitration agreement does not make the agreement "inoperative".
>
> (emphasis added)

[78] The court when confronted by a s. 10 of the AA 2005 application for a stay of the court proceedings and an applicant seeking to refer the matter to arbitration, need not have to abdicate its responsibility to decide on

whether there was an arbitration agreement between the parties to begin with. The doctrine of *kompetenze-kompetenze* conferring the power on the arbitral tribunal to decide on its own jurisdiction does not mean that the court must invariably cede to the arbitral tribunal to decide on jurisdiction when the issue is raised in a s. 10 of the AA 2005 application.

[79] Thus, in the English Court of Appeal case of *Ahmad Al-Naimi (T/A Buildmaster Construction Services) v. Islamic Press Agency Inc* [2000] 1 LI LR 522 Waller LJ held that:

> It is not mandatory and, contrary to a suggestion made by Mr Palmer, the existence of the power does not mean that a court must always refer a dispute about whether or not an arbitration agreement exists to the tribunal whose competence to do so is itself disputed. The Act does not require a party who maintains that there is no arbitration agreement to have that question decided by an arbitral tribunal.

[80] Where the issue before the court is whether there is an arbitration agreement by way of incorporation by reference and the facts are not in dispute, then the court would proceed to interpret the relevant arbitration clause and words or method used in the reference and determine if there has been an arbitration agreement by incorporation by reference. That is a question of law which the court is perfectly poised and positioned to decide. There is no necessity to hear the parties as the intention of the parties is to be gathered from the words used and here it is the arbitration agreement in the main agreements and the dispute resolution clause in cl. 6 of the TSA.

[81] If the court finds that there is no arbitration agreement then the court would not stay the proceedings before it because of the default position is always that the parties may proceed to court to ventilate their claims. See s. 29 of the Contracts Act 1950. It would also offend the basic bedrock of arbitration which is that it can only be had by the mutual consent of the parties in an arbitration agreement and so if there is none, the Court cannot compel the parties to arbitrate a dispute.

[82] To require the court to refer the matter to arbitration without deciding on the issue of whether there is an arbitration agreement which is not null and void, inoperative or incapable of performance would result in the plaintiff here who is dissatisfied with the decision of the Arbitral Tribunal that it has jurisdiction, in the event it so rules as a preliminary issue under s. 18(7) of the AA 2005 to appeal against that decision under s. 18(8) and so it is then back to the High Court again.

[83] However, the arbitral tribunal may also exercise its discretion to decide on the issue of jurisdiction in an award on the merits, in which case the only remedy for the plaintiff here whose stand is that the arbitral tribunal lacks jurisdiction, is that of applying to set aside the award assuming that it is an award against the plaintiff. Much costs, expenses and time would have been incurred.

[84] It must be noted that here we are not dealing with a case where the arbitration agreement or the main contract containing the arbitration agreement had been procured fraudulently or that the main contract was a forgery. See the case of *Macsteel International Far East Ltd v. Lysaght Corrugated Pipe Sdn Bhd* [2023] CLJU 1078; [2023] 1 LNS 1078; [2023] 4 MLJ 551 and the later, Court of Appeal case of *Asia Pacific Higher Learning Sdn Bhd v. Stanford College (Malacca) Sdn Bhd* [2024] CLJU 1598 which distinguished another Court of Appeal case of *Cockett Marine Oil (Asia) Pte Ltd v. MISC Bhd & Another Appeal* [2023] 1 CLJ 20; [2022] 1 LNS 2600; [2022] 6 MLJ 786.

[85] In the English case of *Nigel Peter Albion v. Naza Motor Trading Sdn Bhd* [2007] 2 All ER 1075, Lightman J did propose a possible option where the court may have to give further directions for trial of the issue where a decision on whether there was a valid arbitration agreement cannot be made meaningfully on the affidavit evidence before the court. Be that as it may, the court went on to expound the law as follows:

> [20] I would answer the first and second submissions as follows. Whilst the *doctrine of 'Kompetenz-Kompetenz'* (which is given effect in a domestic arbitration by s. 30 of the 1996 Act) provides that the arbitral tribunal shall have jurisdiction to determine whether the arbitration agreement was ever concluded, *it does not preclude the court itself from determining that question*. There are two reasons why the court must have jurisdiction to rule on whether the arbitration agreement was concluded. The first is that the rule of law in general and subject only to limited exceptions requires that *a party should not be barred from access to the court for the resolution of disputes* unless the grounds for such bar are established. A bar on the ground of *the alleged conclusion of an arbitration agreement* (in general and subject only to limited exceptions) *is not established unless and until the court has ruled on the issue whether it has been concluded*. The second is that, unless and until it is held that the arbitration agreement has been concluded, the compelling factors requiring respect for the terms agreed regarding arbitration do not come into play or at any rate do not come into play with their full force and effect.
>
> (emphasis added)

Decision

[86] We are conscious of the fact that an appellate court should not interfere with a matter involving the exercise of discretion on the part of the High Court unless, it has applied the wrong principle of law or has taken into account matters that are in law irrelevant, or has excluded matters that it ought to have taken into account, or otherwise that no court, properly instructing itself in the law, could have come to the conclusion which in fact

was arrived at. See the Federal Court case of *Vasudevan Vazhappulli Raman v. T Damodaran PV Raman & Anor* [1981] CLJ 84; [1981] CLJ (Rep) 101; [1981] 2 MLJ 150 and the more recent case of *Iskandar Coast Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2019] 7 CLJ 143.

[87] For the reasons given, we allowed the appeal and set aside the order of the High Court. We remitted the matter back to the High Court for hearing and a case management was fixed on 6 November 2023. As for costs, we ordered costs in the cause of the High Court proceedings.